BRIEF IN SUPPORT OF PETITION.

Opinion Below.

The opinion of the Court of Claims has not been officially reported but may be found at page 8 of the Record.

Jurisdiction.

The judgment of the Court of Claims was entered on March 3, 1941 (R. 14). The jurisdiction of this Court is invoked under Section 3, c. 229 of the Act of February 13, 1925; 43 Stat. 939 (U. S. Code, Title 28, Section 288).

Statement.

The facts are set forth in the petition.

Statutes and Regulations Involved.

The statutes and regulations involved are set forth in full in the appendix, *infra*, page 17.

1. The Court of Claims erred in holding that the exercise of State police power does not include requiring security deposits with the State as a condition to doing business in a certain form within the State.

The regulation of insurance companies is the exercise of the State police power, also a State Governmental function since the State is the creator of the corporation. *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 369, 59 L. Ed. 1011; *National Union Fire Insurance Co.* v. *Wanberg*, 260 U. S. 71, 67 L. Ed. 136. This Court will notice judicially the common practice among States in requiring State deposits by insurance companies, but for lists see 32 *Corpus Juris*, Sec. 18, p. 988, footnotes.

The Court of Claims opinion recognizes

> "There is no doubt that any state of the Union has the right under its police powers to regulate and control the issuance of insurance policies in such manner as to protect the interests of the policyholders" (R. 12).

The Illinois statute immediately involved (Sec. 1, Act of April 18, 1899) specifically States that the deposits involved here are to be held by the State

> "* * * for the common benefit of all the holders of its registered policies and annuity bonds * * *" (Appen., p. 20).

Yet the court below holds the deposits outside its own statement of the rule.

The State established a procedure under which it would register policies provided always that as long as such policies were in force—even after registration was discontinued, the company would maintain deposits with the State. If the company did not comply as to deposits, it could not sell registered policies. Once it adopted that form of doing business, the State statute shows that the deposits were required. Sec. 3, Act of April 18, 1899; Secs. 247 and 250, Act of June 29, 1937; Illinois Insurance Code, Art. XV. The record below shows (R. 7, par. 10) that certain of the deposits here were made after registration had been discontinued; therefore they clearly were compulsory under Sec. 250 of the Act of June 29, 1937 (Appen., p. 24).

The court below states that the constitutional question raised is "difficult and somewhat doubtful" (R. 11). The determination affects all corporations and individuals whose business is under State control, yet the Court of Claims dismisses the issue with a solitary citation—*Helvering* v. *Gerhardt,* 304 U. S. 405, 82 L. Ed. 1427, an income rather than excise tax case. The court below admits that *Gerhardt* "does not directly decide the question now presented". It

then states the two rules therein—the one excluding from the immunity "activities thought not to be essential to the preservation of state governments" which it summarily dismisses without further comment, other than that the tax was not paid from the State treasury. Thereupon, it admits again that "none of the rules laid down" by *Gerhardt* "was applied to a state of affairs exactly similar to that in the case before us" (R. 11-12).

No other judicial basis whatever is given for the lower court's conclusion.

The first decision of this Court upon which petitioner relied (*Ambrosini* v. *U. S.*, 187 U. S. 1, 47 L. Ed. 49) is passed over with the statement it has no application and that the facts were quite different, but the court did not make any distinction. In *Ambrosini* there was an "election" as to doing business and no tax was passed on to the State—yet the court below bases its decision on these two facts.

The court below also fails even to mention two decisions of this Court relied upon by petitioner and directly controlling, viz: *Federal Land Bank* v. *Crosland,* 261 U. S. 374, 67 L. Ed. 703; and *Pittman* v. *Home Owners Loan Corp.,* 269 U. S. 253, 70 L. Ed. 392—in both of which the same reasoning, relied upon by petitioner here, was relied upon successfully by the Federal Government. Under the doctrine of "equality" of immunity recognized by this Court in *Metcalf* v. *Mitchell,* 269 U. S. 253, 70 L. Ed. 392, reiterated in *Indian Motocycle Co.* v. *U. S.,* 283 U. S. 570, 75 L. Ed. 1277, these two decisions are pointedly applicable. See also *U. S.* v. *Owens,* 100 Fed. 70.

2. The Court of Claims erred in finding that a State governmental function was not involved because of the "Election" of petitioner to engage in a certain form of business.

Ambrosini (*supra*) "elected" to go into the liquor business. He was not compelled to do so, but having so elected

he was subject to the requirements of the State law as to bond. The individuals involved in *Federal Land Bank* and *Pittman* v. *Home Owners Loan Corp.* (*supra*), "elected" to borrow through Federal agencies.

Insurance companies are not under compulsion to write certain forms or to do business in Illinois, but once the election is made the law imposes certain conditions—as when one elects to marry, to own a dog or become a banker. The conditions imposed by the State here were that these deposits be made. It is the satisfaction of these conditions rather than the "election" which the court below overlooks. The "election" amounts to nothing if the conditions are not satisfied. This is the unmistakable reasoning of this Court in *Ambrosini, Federal Land Bank* and *Pittman, supra.* There was no compulsion to become a notary public in *Warwick* v. *Bettman,* 102 Fed. 127, but this documentary tax (1898) was held illegal as to a bond to qualify a notary.

An Illinois life insurance company "elects" to write health and accident risks. There is no compulsion. But to do so it must make special deposits independent of those involved here. Sec. 4, Act of June 21, 1919.

3. The Court of Claims erred in finding that the State statutes did not require the deposits.

The Illinois insurance statutes, read together, show that special deposits were required as conditions for issuing various forms of policies and that "registered" policies were but one of these forms. *Accident and health,* Sec. 4, Act of June 21, 1919; *Assessment Life Companies,* Sec. 15, Act of July 14, 1927; all *Foreign Insurance Companies,* Sec. 1 of Act of June 18, 1883, as amended June 30, 1925; *all insurance companies of other States,* Sec. 16, Act of March 26, 1869; *Burial Insurance Companies,* Sec. 3b, Act of June 10, 1911; *Casualty Companies,* Sec. 3, Act of April 21, 1899, as amended June 30, 1919; *Fidelity and Surety,* Sec. 4, Act

of June 29, 1915. If the deposits were not made, the forms could not legally be used.

The court below erroneously concluded the deposits here involved were required only of Illinois companies, and to give them some advantage over companies of other states. There was nothing whatever in the record to support that finding. Even if true, this would not determine the question, and the court states it would not be controlling (R. 11).

4. The Court of Claims erred in holding that because the tax was not passed on to the State, there was no direct burden upon the State.

The State bore no burden of the tax paid by *Ambrosini* (*supra*) to his bonding company. In the *Pittman* case, *supra,* this Court reiterated that it was immaterial who paid the tax. The State bore none of the tax on notarial certificates in *Stirneman* v. *Smith, et al.,* (CCA-8) 100 Fed. 600, where this same documentary tax under its 1898 enactment was held illegal. The State bore no burden of the tax on the qualifying bond for a notary in *Warwick* v. *Bettman, supra.*

The Court below fails to see that when this Court, in *Helvering* v. *Gerhardt, supra,* and other cases refused to extend the immunity doctrine to give "private persons" an advantage in ordinary or "commercial" transactions, it did not mean that the rules in *Gerhardt* control, where, as here, no advantage exists or is claimed.

This Court specifically stated in the *Gerhardt* case that its decision rested upon a reason different from that in *Indian Motocycle Co.* v. *U. S., supra.* The effort of salaried officers to avoid their share of a tax imposed on persons generally has no similarity to an enforced transaction

with a State engaged in the regulation of its corporations. When the petitioner *transfers* its securities on sale or redemption, it pays its full share of tax. Under the decision below its transfer tax is multiplied several times although there has been no transfer.

5. The Court of Claims erred in failing to find that the deposit of securities was the "Means" or "Instrumentality" employed by Illinois in the exercise of a Governmental function, and therefore exempt.

In the *Federal Land Bank* case, *supra,* this Court held that the mortgage deed itself, rather than the bank, was the "instrumentality" and prohibited the tax on the mortgage or its use. The same in the *Pittman* case, *supra.* They follow the reasoning in *Ambrosini, supra,* that the document must be considered together with its use. The recording of the mortgages was an act or use for official purposes, distinct from the execution of the deed. In all three of them the "election" of the individual put the machinery in motion, but this Court disregards that fact.

Similarly, the deposit of securities in the present case was a purely official use, at least equally a "means" employed by Illinois as the recording was a "means" employed by the Federal Government. *Thomson* v. *Union Pacific R. R.,* 9 Wall. 579; 19 L. Ed. 792. This "use" which transforms an otherwise common transaction into an official and immune one is well shown in the *Stirneman* case, *supra.* In the present case, the State of Illinois must always be one of the parties. *Indian Motocycle, supra.*

If the function is governmental, as must be recognized in this case, the extent of the interference is immaterial and the prohibition is absolute. *Metcalf* v. *Mitchell, supra*; *Indian Motocycle, supra; Gerhardt, supra.*

6. The Court of Claims erred in considering that because these deposits are not within the statutory exemptions, they are subject to Federal taxation.

One of the bases for the decision below is the alleged uniformity of administrative construction of the taxing act and the fact the transactions here involved are not within any of the exceptions in the statute (R. 10).

There is no public record of any prior attempt to apply the statute to transactions such as those involved here. The decision below shows that fact, the law reports and services fail to disclose an instance of it, and the court below was given to understand this was the first case. Since no prior case existed, the doctrine of past construction falls.

As to the statutory exceptions, the exemption here involved existed before there was a Congress. *Ward* v. *Maryland,* 12 Wall. 427. A statutory exemption is futile, for without it the same result would doubtless be reached by judicial construction. *Stirneman* v. *Smith, supra.*

Regulations 71, Art. 35 (r) provide that the tax shall not apply to transfers which result wholly by operation of law. It would appear that under the decision of the Circuit Court of Appeals for the Ninth Circuit in *U. S.* v. *Merchants Nat. Trust & Savings Bank,* 101 Fed. (2d) 399, the deposits and withdrawals here involved would come within this category.

7. The Court of Claims erred in approving an administrative regulation which on its face extends the statute by punctuation and in violation of the legislative intent.

The Bureau construes these deposits and withdrawals as "deliveries" under par. (a) (9) of Schedule A sec. 800, Title VIII of the revenue act of 1926, as set up in Article 120 of Bureau Regulations 71. That article, however, in-

serts in the statutory phrase "memoranda of sales or deliveries" a comma which does not appear in the statute, thus changing it to "memoranda of sales, or deliveries". (Appen., p. 18).

The statutory section as a whole, particularly the provisos; the legislative history and the Regulations otherwise all show the statute intended only to cover *transfers. Senate Finance Report*, No. 665, 72d Cong., 1st Sess., Calendar #705, pp. 12, 47; *Conference Report*, No. 1492, 72d Cong., 1st Sess., H. R. 10236, pp. 25-26 and headings for amendments 226-230.

The 5th proviso of the Federal Statute (Appen., pp. 18-19) specifically provides that:

> "Where the transfer is by delivery of the instrument assigned in blank there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamp shall be affixed; and every bill or memorandum of sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers."

It is clear from this that the form of memorandum prescribed relates only to sales. No other form ever has been prescribed by either the statutes or the regulations which could apply to the deposits involved here. This particular proviso confirms the petitioner's claim that wherever the statute refers to "deliveries", it means transfers perfected by mere delivery.

The "underlying essence" which determines taxability under this statute (*Helvering* v. *Tex-Penn Oil*, 300 U. S. 481, 493; *Bowers* v. *Lawyers Mtg. Co.*, 285 U. S. 182, 188; *U. S.* v. *Phellia*, 257 U. S. 156, 168) is that the "power to command the disposition" of the deposited bonds (*Raybestos-Manhattan, Inc.* v. *U. S.*, 296 U. S. 60, citing *Provost* v. *U. S.*, 269 U. S. 443, 458-9) never left the petitioner here.

The lower court finds (R. 6, par. 6) that no authority exists in Illinois to dispose of the deposited bonds except *back to the petitioner,* unless the latter becomes insolvent. Even in that event, and under secs. 188 and 191, Art. XIII of the Illinois Insurance Code adopted June 29, 1937; and secs. 2-4 of Act of June 26, 1925, as amended May 20, 1929, the State through its attorney general must institute special court proceedings before it gets full title, and that title is not perfected until the order of court (Appen., p. 24).

Conclusion.

It is submitted, therefore, that this case is one calling for the exercise of this Court's powers, that the errors recited may be corrected, the law properly and authoritatively defined, and the judgment of the Court of Claims reversed. To such an end petitioner prays a writ of certiorari be granted.

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